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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1911.

No. 176.

LEWIS P. WINGERT, APPELLANT,

versus

THE FIRST NATIONAL BANK, OF HAGERSTOWN, MARYLAND, ET AL., APPELLEES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR THE APPELLEES.

STATEMENT.

The First National Bank, of Hagerstown, Maryland, owns a lot of ground in the business center of Hagerstown, nearly opposite the County Court House, adjoining Hotel Hamilton, opposite the Maryland Surety and

Trust Company, and near many of the most important buildings and places of business in the Town.

This lot has been owned and occupied by The First National Bank of Hagerstown, Maryland, for a great many years; it fronts about forty (40) feet on West Washington Street, and runs back two hundred and forty (240) feet to an alley.

At the time of the institution of this suit, there was on the lot a three-story brick building, a photograph of which is found between pages 127 and 131 of the Record. The first floor of this building was used by the Bank for banking purposes, and the remainder of the building was rented to and occupied by tenants of the Bank.

The building had been in use for many years, but little money had been spent in the way of repairs, and the Directors determined that their banking room was not adequate to the business of the Bank. At a regular meeting of the Board, the Directors determined to tear down the old building, and erect in its stead a modern six-story bank and office building, of which the first floor was to be used exclusively by the Bank, and the remaining floors to be rented out for offices. All the Directors of the Bank, except William Wingert, a Director, and brother of the Appellant, voted for these improvements. He voted against them. The Appellant then applied to the Circuit Court of the United States for the Fourth Circuit, in and for the District of Maryland, Baltimore, for an injunction to prevent the Appellees from erecting a new building on their lot as contemplated. Depositions were filed by the respective parties to the cause in support of their views of the case, and upon a hearing of said cause, the Court refused to grant the injunction as prayed. Testimony was taken, the cause brought to a final hearing, and the Court again refused to grant the injunction, and dismiss-

ed the Bill of Complaint. From this decision and order, an appeal was taken to the United States Court of Appeals for the Fourth Circuit, at Richmond, Virginia, and the judgment of the lower Court was affirmed, and from the decision of the Circuit Court of Appeals, this appeal has been taken.

During the litigation above referred to, the Directors proceeded to tear down the old building, and erected a new six-story office and bank building in its stead.

ARGUMENT.

The Appellant bases his claim for injunction upon the theory that it is *ultra vires* the Bank to erect a building on its said lot to be used for any other than banking purposes. This is the main question before Your Honorable Court.

FIRST AS TO THE TESTIMONY.

Exceptions have been filed by the Appellees to much of the mass of testimony taken by the Appellants in chief and in the cross-examination of the Appellees' witnesses (Pages 310 to 316 Record). The irrelevancy of the testimony to which exceptions are noted is so apparent as to require no argument.

SECOND AS TO THE BANK'S TITLE TO THE LOT OF GROUND IN QUESTION.

The second preliminary question has reference to the Bank's title to the lot of ground in question.

The Bill of Complaint alleges that the Bank owns the

lot (Page 3 Record). See also deposition of Complainant (Page 14 Record) and yet the Appellant (Page 15 Record) files a deposition to the effect that the Bank has no deed for the lot. The facts are, on April 28th, 1857, J. Dixon Roman, Trustee, conveyed to The Hagerstown Savings Bank this lot (See Exhibit Deed page 283 Record). The lot is identified by F. W. Mish (Page 136 Record) as the lot now occupied by the Bank. This lot has been in the use and occupation of the Bank since its organization (Page 136 Record). The Hagerstown Savings Bank was converted into The First National Bank of Hagerstown, Maryland, as will appear by Exhibit "Organization Certificate" filed as testimony (Page 290 Record) under which all the holdings, property and property rights of the Hagerstown Savings Bank passed to and became the property of The First National Bank of Hagerstown, Maryland. This, we most respectfully submit, ought to settle the question of ownership of the lot.

The real question at issue is:

Is it *ultra vires* The First National Bank of Hagerstown, Maryland, to tear down the old Bank building on its lot and to erect in place thereof a six-story Bank and Office Building?

We most respectfully submit that it is not.

The Directors of the Bank are charged with a violation of the provisions of Sec. 5137 of the Revised Statutes of the United States, which provides that "a National Bank Association may purchase, hold and convey real estate for the following purposes, and no others.

1st. Such as shall be necessary for its immediate accommodation in the transaction of its business.

2nd. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

3rd. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

4th. Such as it shall purchase at sales, under judgments, decrees or mortgages held by the Association, or shall purchase to secure debts due it, but no such Association shall hold the possessions of any real estate under mortgage, or the title for any possessions of any real estate purchased to secure any debts due it for a longer period than five years.

The wrong complained of has reference more specifically to the first purpose set forth in the Act for which a National Bank may hold real estate.

The Act specifically provides for the purchase and holding of such real estate as may be necessary for it's immediate accommodation in the transaction of its business. This Bank never purchased nor held any other real estate than the lot upon which it has transacted its banking business ever since its organization as a National Bank. It is therefore guilty of no *ultra vires* act in owning and holding the real estate in question, and the violation of the Banking Act, if any such there be, must be found in the act of improving the realty owned, held and occupied by the Bank for many years for its immediate accommodation in the transaction of its business and in adding rooms thereto to be rented out to tenants, and not in the exclusive use of the Bank.

A stockholder can only object to an *ultra vires* act which is clearly beyond the express or implied powers of the Corporation. Section 5137 only prohibits the corpor-

ation from purchasing, holding or conveying land in excess of the amount required for the purposes of the Banking institution. There is not the slightest evidence in this case that the Bank is intending to purchase more land for the purposes of an office building. On the contrary, the land in question was purchased long before the Bank itself came into existence as a National Bank. It is not seeking to hold for purposes other than that of the Bank and there is no evidence to the effect that the lot is larger than is necessary for the purposes of the Bank. The only objection raised in the Bill is as to the Bank's right to *improve* a lot, which it has owned for sixty years. It is therefore submitted that in an action of this kind brought by a minority-stockholder the question of *ultra vires* cannot be raised as the act complained of does not transcend the restrictions of the statute. To hold to the contrary would be to read into the statute the word "improve" where the law simply refers to the right to hold and convey.

The purpose of the restrictions and limitations placed on National Banks with reference to dealings and transactions in real estate is well understood, and it was deemed wise to make them, but it certainly was never intended to extend these restrictions to the limit set up by the Appellants, namely, to prevent the improvement and repair of the building used by the Bank for its immediate accommodation in the transaction of its own business. The liberal construction put upon the act in this particular is manifest in the case of

Cooper et al. vs. Hill, 94 *Federal Reporter*, 582.

In this case the Court says "A National Bank which has lawfully acquired the title to property in payment of a

debt, has implied authority to make reasonable repairs thereon for the purpose of putting it in a salable condition, and its directors cannot be held personally liable for money so expended in good faith."

The same liberal spirit is shown in the case of

National Bank vs. Matthews 98 *United States Reports*, 621.

In this case, it is true, the Court is dealing with Section 5176 of the National Bank Act, but the same principles of construction are applicable to both sections.

The decisions of the Court in the following cases are to the same effect:

Reynolds vs. Crawfordsville Bank 112 *U. S. Reports*, 405.

National Bank vs. Whitney, 103 *U. S. Reports*, 99

"A National Bank empowered by its charter to provide real estate necessary for its immediate accommodation in the transaction of its own business cannot interpose the defense of *ultra vires* to a contract made by it to secure the full entrance of light and air into its Banking Home."

Trustees First Presbyterian Church in Newark vs. National Bank of Newark, 57 *N. J. Law*, 27 *Atlantic Reporter, Vol.* 29, *page* 320.

Affirmed in 58 *N. J. Law*, 406, *Atlantic Reporter*, 36 1129.

Roebling vs. Richmond First National Bank, 30 *Fed. Reporter*, 744.

The question as to whether the acts complained of in this case is *ultra vires* has been passed upon by the United States Circuit Court of Appeals in a case almost identical with this case, being the case of

Brown vs. Schleier, reported in 112 *Federal Reporter, page* 577 *etc.*

And passed upon by the Court of Appeals in 118 Fed. Reporter, page 981 and especially 984.

This was a case in which a National Bank erected a building on a lot of ground leased by the Bank and the question was raised as to whether the Bank had power to do so. In the Court's opinion is found this language. "nor do we perceive any reason why a National Bank when it purchases or leases property for the erection of a Banking Home should be compelled to use it exclusively for banking purposes. If the land which it purchases or leases for the accommodation of its business is very valuable, it should be accorded the same rights that belong to other land owners of improving it in a way that will yield the largest income, lessen its own rent and render that part of its funds which are invested in realty most profitable. There is nothing, we think, in the National Bank Act, when rightfully construed, which precludes National Banks so long as they act in good faith from

pursuing the policy above outlined." The Court in this same case says further: "This act ought not to be construed in such a way as to compel a National Bank when it acquires Real property for a legitimate purpose, to deal with it otherwise than a prudent land owner would deal with such property." This case was afterwards passed upon by this Honorable Court

in 118, *U. S. Reports, folio* 18,

and although the question at issue in this case was not passed upon by this Court it does say that the proceedings referred to were not *ultra vires*.

The case at bar comes directly within the rulings of the Court in the case of Brown vs. Schleier. The only difference being that in the case of Brown vs. Schleier the building was erected on leasehold property just acquired, whereas in this case the Appellees are simply putting up a new building on a lot of ground owned by it for many years, or in other words, simply improving its own property.

The Bank is located in the center of the business section of Hagerstown. See plat, between pages 22 and 23 Record, and plat between pages 119 and 127 Record, and pages 32, 34, 35, 36, 38, 64, 137, 141, 242, 248, 262, 268 and 274, Record.

Hagerstown is a rapidly growing business and manufacturing Town and Railroad center, and has a population of about 18,000. (Pages 32, 33, 35, 36, and 38 Record)

The Bank's lot without any improvements is worth from $35,000.00 to $40,000.00. (Pages 33, 34, 36, 37, 39, 64, 88, 93, 95, 141 and 235 Record). The income from the rents of the portion of the Building not used by the Bank

will be such as to virtually give the Bank a Banking room free of cost. (Pages 33, 34, 36, 37, 39, 141, 142, 146, 242, 243, 247, 251 and 274 Record).

The investment will be a good one, and the best that can be made of the funds of the Bank. (Pages 32, 34, 35, 37, 38, 141, 142, 146, 162, 235, 243, 247, 248, 257, 258, 259, 262, 263, 268, 269 and 274 Record). The Building is situated in the part of the Town where offices are in great demand. (Pages 32, 34, 35, 37, 38, 142, 146, 235, 248, 257, 258, 262 and 269 Record).

The Directors of the Bank believe that they will have no trouble in renting the offices and believe that the income derived therefrom will be greater than that which would be derived from investing the same amount of money in the ordinary way.

The Directors of the Bank were influenced by these considerations when they determined to make the improvements. The Directors acted in good faith and followed their best judgment in the matter.

The question of making the improvements to the Bank's building was virtually determined upon in January 1909, and at a special meeting later in the same month, it was again determined to tear down the old building and erect in its place a six-story Building (Pages 74, 75 and 85 Record). At meetings on the 2nd and 9th of March, 1909, respectively, the matter was again passed upon and the building as hereinbefore set forth was determined upon. (Pages 137 and 138 Record). The only person voting against the contemplated improvements was William Wingert, a Brother of the Complainant. (Pages 138 and 152 Record). Again after the suit was brought, the Board determined to proceed with the improvements as contemplated. (Pages 138 and 152 Record).

When the Directors found that one of its number was opposed to the improvements, to further show their good faith in the matter, the opinion of the Comptroller of the Currency was sought and the Comptroller replied by referring, to the case of Brown vs. Schleier (Page 41 Record). The Directors then submitted the question of the contemplated improvements to the Stockholders of the Bank and a majority of the Stockholders approved of the course of the Directors. (Page 299 Record) (and see Page 294 for list of stockholders).

In offering the Exhibit "Consent of Stockholders" the Appellee does not admit that it was really necessary to get the consent of the Stockholders. It was done simply to show good faith on the part of the Directors. The Directors are the proper persons authorized to manage the internal affairs of a corporation, and we submit that they had full power to determine upon and carry out the contemplated improvements without consulting the stockholders, but, desiring to know the feeling of the Stockholders, they consulted them, thereby showing their good faith and their desire to act in accordance with the wishes of the majority of the Stockholders.

A minority Stockholder does not have the power to interfere with and impede the work of a Board of Directors of a corporation in the manner contemplated by this suit. The danger of this contention is fully set forth in the case of

Shaw vs. Davis, 78 *Md.* 308.

in which the Court says on page 316 of its opinion "And first, it may be stated as the result of all authorities that whenever any action of either directors is relied on in a suit by a minority stockholder for the purpose of invok-

ing the interposition of a Court of Equity if the act complained of neither be *ultra vires*, fraudulent or illegal, the Court will refuse its intervention because powerless to grant it, and will leave all such matters to be disposed of by the majority of the stockholders in such manner as their interests may dictate and their action will be binding on all whether approved by the minority or not."

If such were the case, then as the Court observes in the last mentioned case on page 317 of its opinion. "Now if that gives a right to every member of the company to file a Bill to have the question decided, then if there happens to be a cantankerous member, or one member who loves litigation everything will be litigated."

In the case at bar, if the views of the Appellant are to be sustained, then one Stockholder of this Bank will be given the authority and power to override the views, opinions and purposes of all the Directors of the Bank, excepting the one with whom he agrees, and the views of the Board of Directors and the Stockholders will be of no avail. The evils resulting from such a state of affairs are too apparent to admit of further argument.

WHO HAS THE RIGHT TO COMPLAIN OF ULTRA VIRES ACT?

Even if the acts of the Directors of the Bank are *ultra vires*, is a Stockholder of the Bank the proper person to complain?

If the acts are *ultra vires*, they must be so by reason of a violation of the United States Statute which limits and prescribes the powers of the National Bank, and not

by reason of any relations or matters of contract existing between a Stockholder and the Corporation.

If the act is *ultra vires*, the sovereign power is the proper and only party to complain. If the Directors committed an *ultra vires* act in this case, it must be in violation of Section 5137 of the National Bank Act, dealing with powers of National Banks with reference to Real Estate. In

National Bank vs. Matthews, 98 *U. S. Reports*, 628, the Court says:

"Where a Corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void but only voidable, and the sovereign alone can act. It is valid until assailed in a direct proceeding instituted for that purpose." The Court further says in this case, quoting from Chancellor Kent, "Perhaps it would be sufficient for this case that the Plaintiffs are a duly incorporated body with authority to contract and take mortgages and judgments and if they should pass the exact line of their power it would rather belong to the Government of Pennsylvania to exact a forfeiture of their Charter than for a Court in this collateral way to decide a question of misuser by setting aside a just and bona fide contract."

The Court says in

National Bank vs. Whitney, 103 *U. S. Reports*, 102

"And after citing numerous cases where a disregard of statutory prohibition has not been held to vitiate the con-

tracts of parties but only to authorize actions of the Government against them, the Court held that the prohibitory clause of the Banking law did not vitiate the Real Estate securities taken for loans and that a disregard of them only laid the association open to proceedings by the Government." "The impending danger" said the Court, "of a Judgment of Ouster and Dissolution was, we think, the check and none other, contemplated by Congress." That has been always the punishment prescribed for the wanton violation of a Charter, and it may be made to follow whenever the proper public authority shall see fit to enforce its application."

The construction of the Act of Congress thus given has been acted upon by the National Banks throughout the country ever since it has been published. It is not unreasonable to suppose that they have conducted their business and made their loans to a large amount in reliance upon it, and that in many cases great injury would follow a departure from it.

Judicial decisions affecting the business interests of the country should not be disturbed except for the most cogent reasons, certainly not because of subsequent doubt of their power.

The prosperity of a commercial community depends in a great degree upon the stability of the laws by which its transactions are governed. If there should be a change, the Legislature can make it with infinitely less derangement of these interests than would follow a new ruling of the Court for statutory regulations would operate only in the future.

The decision in the case cited controls the present case, and in conformity with it we must hold that the mortgage to the Bank so far as its subsequent encumbrances are concerned, is to be regarded as a valid se-

curity for the future advances to the mortgagor. Whatever objections there may be to it as security for such advances from the prohibitory provisions of statutes, the objection can only be urged by the Government.

Reynolds vs. Crawfordsville Bank 112 *U. S. Reports*, 413.

Whatever punishment is to be meted out to the Bank and its directors for a violation of the Banking Act must come from the sovereign power whence the Bank obtained its powers and not from an individual or private person.

In Hagerstown Manufacturing Company versus Keedy, 91*st Md., page* 430.

It is held, "When a corporation is authorized by its charter or by general statute, to hold land for some purpose, its right to take and hold any particular parcel can only be called in question by direct proceedings instituted by the State.

"The beneficial Association thus having by law the capacity to purchase and hold real estate under some circumstances, and having purchased the lots of ground in controversy, and taken a conveyance of them, the question remains whether in the absence of fraud, the Appellee as its assignee is entitled to maintain the present bill upon the mere ground that the Association exceeded its powers in making the particular purchase. The weight of authority is plainly against the right of the Appellee to do so.

"It has been repeatedly held in Maryland and elsewhere, that when a corporation has, by its charter or by general statute, power to hold land for some purpose, or to a limited extent, its right to take and hold any partic-

ular parcel of land is a matter solely between the corporation and the State, and can be called in question only in a direct proceeding by the State for that purpose."

Quoting Cowell versus Colorado Springs Company, 100 U. S. 55; Hamsher versus Hamsher, 132 Ill. 237, and other Maryland cases.

The Court further says, "The doctrine that even where a corporation has no power to take or hold real estate, a deed made to it is not void but voidable, and that only at the suit of the State, has found strong support."

Quoting Union National Bank versus Matthews, 98 *U. S.* 623;

Reynolds versus First National Bank, 112 *U. S.* 405 and

Fritts versus Pullman Company, 132 *U. S.* 282.

We submit, however, that a recent decision by your Honorable Court is conclusive of the question here involved. We refer to the case of Robert Earl Kerfoot vs. Farmers & Merchants Bank et al. 218 U. S. 281. In this case a number of the authorities above referred to are quoted. In that case the decision of the Court is clearly to the effect that even if the Appellee has been guilty of an *ultra vires* act in the matter complained of, the sovereign alone can object.

We therefore most respectfully submit that the judgment of the District Court and of the United States Circuit Court of Appeals ought to be affirmed.

CHARLES A. LITTLE,

GEORGE R. GAITHER,

Solicitors for the Appellees.